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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-397

H. O. FORGY, III,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Tennessee

R. A. ASHLEY, JR.
Attorney General of Tennessee
414 Supreme Court Building
Nashville, Tennessee 37219

ROBERT H. ROBERTS
Assistant Attorney General
414 Supreme Court Building
Nashville, Tennessee 37219

Attorneys for Respondent

HENRY V. SUTTON
Suite 2904
100 North Main Building
Memphis, Tennessee 38103

KEMPER B. DURAND
Suite 1105
Union Planters Bank Building
Memphis, Tennessee 38103

Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Tennessee

Henry V. Sutton and Kemper B. Durand, retained counsel for Petitioner, H. O. Forgy, III, pray that a Writ of Certiorari issue to review the judgment by the Tennessee Supreme Court entered in the above cause on July 15, 1974 and August 12, 1974.

OPINIONS BELOW

The Court of Criminal Appeals of Tennessee at Jackson, wrote an Opinion in this cause, which was styled *H. O. Forgy, III vs. State of Tennessee*, No. 13 Madison Criminal, which was

filed on February 13, 1974, and being unpublished, a copy of said Opinion is appended hereto. Petitioner's application for a Writ of Certiorari before the Tennessee Supreme Court was denied July 15, 1974, together with his Motion to Strike and Expunge From the Record, and no Opinion was written by the Court, and a copy of the order evidencing said denial is appended hereto. Petitioner's Motion to Reconsider Petition for Certiorari was denied August 12, 1974, with no written Opinion, and a copy of the denial is appended hereto.

JURISDICTION

The judgment of the Supreme Court of Tennessee was made and entered on July 15, 1974 and August 12, 1974. The jurisdiction of this Court is invoked under Title 28 *U.S.C.* § 1257(3) providing review by the Supreme Court of the United States of America by Writ of Certiorari where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Were Petitioner's constitutional rights to due process and/or equal protection of the law violated by the Trial Court's allowing the State's Attorney to inject racial and social prejudices into the trial through questioning of Petitioner and other witnesses?

2. Were Petitioner's constitutional rights to due process and/or equal protection of the law violated by allowing the conviction to be sustained on the uncorroborated testimony of an accomplice when Tennessee law clearly states that the uncorroborated testimony of an accomplice is not sufficient to sustain a conviction?

CONSTITUTIONAL PROVISIONS INVOLVED

"*Amendment 5*

"*Criminal Actions—Provisions concerning—Due process of law and just compensation clauses.*—No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"*Amendment 6*

"*Criminal Actions—Right to be informed.*—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

"*Amendment 14*

"*Section 1. Citizenship—Due process of law—Equal protection.*—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

H. O. Forgy, III, Petitioner in this case seeks review of the Tennessee Supreme Court's affirmation of his conviction for the sale of heroin (52 *T.C.A.* § 1413) and subsequent five (5) year penitentiary sentence (52 *T.C.A.* § 1432). Petitioner was indicted in Madison County, Tennessee for allegedly selling a controlled substance, heroin, to a Jackson, Tennessee police officer who testified he purchased the substance in question at Mr. Forgy's home five or six miles outside the jurisdictional and city limits of Jackson, Madison County, Tennessee. (R. 35, 51, 52). The State alleged that Mr. Forgy had violated *T.C.A.* § 52-1432, by selling a quantity of heroin to one Shaw. (R. 3). The jury found him guilty of selling heroin and sentenced him to five (5) years in the penitentiary. Mr. Forgy timely filed his Motion for New Trial. The motion was overruled by the Trial Court, and Mr. Forgy proceeded to perfect his appeal to the Court of Criminal Appeals sitting at Jackson, Tennessee, where the judgment of the Trial Court was affirmed in an unpublished Opinion filed February 13, 1974. (R. 10-20, 22, 23).

Petitioner made an application to the Supreme Court of Tennessee for a Petition for Writ of Certiorari to the Court of Criminal Appeals of Tennessee and said petition was denied by the Supreme Court of Tennessee on July 15, 1974 with no written opinion. Petitioner filed a Petition to Reconsider Petition for Certiorari, which was denied by the Supreme Court of Tennessee on August 12, 1974 with no written opinion. Petitioner

requested and was granted by the Tennessee Court of Criminal Appeals a Motion to Stay Execution of Judgment Pending Certiorari on September 10, 1974.

The trial of this case was a matter of direct conflict of testimony between Petitioner, H. O. Forgy, III, and his witness, Jimmy Patterson, on the one hand and the testimony of State's witness, Shaw, on the other hand. (R. 93-115, 115-144, 32-64).

Mr. Forgy and Mr. Patterson directly contradicted the testimony of Shaw concerning the alleged sale of heroin, the *corpus delicti*. (R. 93-115, 115-144, 32-64). No witness corroborated Shaw's testimony concerning the *corpus delicti*. (Entire Record). During the trial, therefore, the entirety of the State's proof concerning the *corpus delicti*, or the alleged sale of heroin, was solely by the witness, Shaw. (Entire Record, R. 32-64).

Three other witnesses testified for the State: Sgt. Moore, who was Shaw's superior on the police force (R. 66-67); Officer Anderson, who took the substance to the Department of Public Health Toxicology Laboratory in Nashville (R. 67-68); and Mr. Freeze, who was an employee of the Department of Toxicology. (R. 80). None of these witnesses added any facts concerning the alleged sale of heroin to Shaw. (R. 66-67, 67-68, 80).

Shaw testified he was an employee of the Jackson, Tennessee Police Department and that he had worked four or five months investigating narcotics cases. (R. 32). By Shaw's account, he was directed to Mr. Forgy's trailer in the ". . . Robin's Trailer Court outside the city limits of Jackson" by a man named, Buck Brown. (R. 34, 35). Shaw testified that he and Brown went in Shaw's automobile to Mr. Forgy's trailer, arriving at approximately 10:00 p.m., finding Mr. Forgy, Jimmy Patterson, and two other unknown individuals present in the trailer. (R. 36-39). Shaw said he had made no attempt to bring the other two people to court as witnesses or to learn their identity. (R. 58, 59).

Shaw's version of the alleged offense was that once in the trailer Brown and Shaw accompanied Mr. Forgy to the back of the trailer where Mr. Forgy removed four aluminum foil packets from some unknown place and gave one to Brown and one to Shaw. (R. 39). Shaw said he told Mr. Forgy he did not have money to pay for the packet, but that he could give Mr. Forgy his wrist watch (a Timex electric), (R. 47), which he would redeem the next day with money at Mr. Forgy's father's warehouse. (R. 39, 40).

Thereafter, Shaw testified they went to the front room where, he said, Mr. Patterson, Mr. Forgy, and Brown prepared "this substance in a spoon and with some liquid substance they heated the spoon and took this substance and injected it into a needle and injected this substance into their arms." (R. 40). Shaw said he put the substance he bought in his pocket (R. 40) and later put it in the medicine bottle or vial, (Ex. 4), which he put in an envelope, (Ex. 1), which envelope was turned over to Moore on December 10, 1971, two days later. (R. 42, 43, 45, 46).

Shaw said he and Brown stayed at the trailer until 11:00 p.m. or 11:30 p.m., and that he then took Brown home and went home himself. (R. 40). The next day, Shaw testified, he met Mr. Forgy in Jackson at the H. O. Forgy Warehouse on Chester Street, and Shaw then told Mr. Forgy he had come for his watch, and that he had the money he had promised Mr. Forgy. (R. 49). Earlier, he had testified that he told Mr. Forgy he would redeem his watch for $20.00—$10.00 for Brown's packet and $10.00 for Shaw's packet. (R. 41).

Under cross-examination, Shaw testified that he was employed by Chief Harvey Marcom of the Jackson Police Department on October 15, 1971 (R. 50) before this alleged offense took place on December 8, 1971. He also testified that, as a member of the Jackson Police Department, his jurisdiction was limited to the city limits of Jackson (R. 51, 52), and that Mr. Forgy's trailer in the Robin's Trailer Court on Steam Mill

Ferry Road was in the Maddison Hall community, five or six miles outside the city limits of Jackson. (R. 52). He further stated that Mr. Forgy's case was the only one he had ever investigated outside the city limits of Jackson. (R. 53).

Shaw admitted, also under cross-examination, that he lied to Mr. Forgy when he allegedly obtained the packet from him in telling Mr. Forgy he had no money. (R. 56). He said he intended to go to Mr. Forgy's house to make a purchase, but that he lied to Mr. Forgy about the money, because he realized he was outside the city limits and decided to "consummate the deal inside the city limits" by offering his wrist watch for collateral. (R. 56).

It should be realized that, in addition to the facts concerning the issue of a conviction based solely on the uncorroborated testimony of an accomplice, the Attorney General sought and received answers to questions about the appearance of Mr. Forgy at the time Shaw observed him and the relationships of Mr. Forgy and Mr. Patterson with black persons.

Just before the conclusion of Shaw's testimony the following appears in the Record from page 48, question 166, through page 49, question 120, and the answers following those questions:

> Q. 116 Let me ask you this at the time of this transaction the night before and out there on the parking lot was the defendant's appearance the same or had there been any change?
>
> A. Yes, sir, it is.
>
> Q. 117 What is the change?
>
> MR. DAVIS: I object to that, if the Court please, he may have had a bath out there at that time and may have been washed up——

THE COURT: Overruled, Mr. Davis. You may ask the question. Proceed.

Q. 118 What was the change?

MR. DAVIS: Note an exception.

THE COURT: So noted.

A. At this time, Mr. Forgy, at that time he had a beard, a longer mustache, and longer hair. Possibly, I believe, it was shoulder length.

Q. 119 Let me ask you this question.

MR. DAVIS: This has nothing at all to do with the guilt or innocence of this man.

THE COURT: The State has a right to put their case on, Mr. Davis. At this point, I can't say that. I don't know. He may answer the question.

Q. 120 Do you have any questions in your mind that even though you know there was a change as to the identity of this young man?

A. No, sir, I don't.

On redirect examination, the Attorney General elicited testimony from Shaw that Brown was a black man and that Mr. Forgy (a white man) and Brown appeared to know each other "very well." (R.64).

The State was discussing Patterson's occupation with the defendant on cross-examination. In an attempt to discredit the credibility of Patterson and to leave the impression with the jury that the trailer was the center of drug selling, the Prosecutor asked the defendant:

Q. 50. What was Patterson's occupation for a living?

A. He was a carpenter.

Q. 51. Who was he working for?

A. I don't know.

Q. 52. Why did you say he was a carpenter. Did you see him do any carpenter work?

A. Yes.

Q. 53. Where and for who?

A. I don't know who for. I don't know. I know he was a carpenter.

Q. 54. *Well the truth of it he was just in the narcotics business, wasn't he? Did you know that?*

A. No, sir, I don't think he was.

Q. 55. Sir?

A. No, I don't think he was.

TR. p. 75
(emphasis added)

Thereafter, upon cross-examination of Patterson, the State asked:

Q. 99. For what purpose would you and he (Buck Brown) make a trip to Memphis together for?

A. Just to get out of town.

Q. 100. Did anyone else ever go along with you?

A. Usually just Buck and myself.

Q. 101. *Isn't it the trath that you and Buck were going over there and picking up some kind of drugs and narcotics and come back over here and sell them? Isn't that the truth of the matter?*

A. No, sir, that is not the truth.

TR. p. 100
(emphasis added)

Apparently not satisfied with this answer, the State asked this witness numerous questions about his trip to Memphis, including these:

Q. 114. Did you go any particular place?

A. Several places.

Q. 115. South Highland Strip is in the vicinity of Memphis City area, isn't it?

A. Yes, it is.

Q. 116. Did you go in any places in that area?

A. Yes.

Q. 117. For what purpose did you go?

A. To have something to do.

Q. 118. What did you do?

A. Shot pool. Visited personal friends that I knew.

Q. 119. *Well, don't you know that South Highland Strip is a known drug area there in Memphis?*

A. I would say that any particular area could be called a known drug area.

Q. 120. *South Highland Avenue, that has the reputation of being the drug area.*

A. Only because it is around the college campus.

TR. p. 102
(emphasis added)

While cross-examining Mr. Patterson, the Attorney General injected the issue of race into the case by asking, "Did you make any trips from Memphis with any other colored boys other than Buck Brown?" (R. 133). The Attorney General had earlier asked Mr. Patterson about taking two or three trips to Memphis with Mr. Brown. (R. 130-133). The Attorney General had also

pointed out earlier that Buck Brown was a friend of Mr. Forgy's; that Brown visited in Mr. Forgy's home before; and that Brown had been in the courtroom earlier. (R. 101-102).

Again, the Attorney General injected the issue of race into the case while he was cross-examining Mr. Patterson when he asked, "Weren't you there one night when you met Buzz Shaw, you and another colored girl and also Moose Hannah?" (R. 137). The Attorney General further asked, "Did you ever go there in the company of a colored girl?" and "Did you ever keep company with one while down there?" (R. 137).

After the State's evidence was concluded (R. 92), Mr. Forgy's attorney moved for a directed verdict, which motion the Court overruled. (R. 93). Thereafter, Mr. Forgy took the stand in his own defense. (R. 93).

H. O. Forgy, III testified that he was single (R. 99); that he was 24 years old; that his father was H. O. Forgy, Jr.; that he had graduated from Jackson High School; that he went into the United States Army in July, 1968 and was honorably discharged in July, 1970, having served in Germany eighteen months; that he was presently in the active reserves (R. 93, 94); and that he had worked for H. O. Forgy & Son making approximately $100.00 per week at the time Shaw visited him. (R. 99).

Mr. Forgy testified that he was not guilty of selling heroin. (R. 94, 95). He said Shaw did come to his home once during the last year with Buck Brown, but did not remember the date. (R. 95). He also said it was in the afternoon when they came, at 5:30 p.m. or 6:00 p.m., and that it was still light outside, because he looked out of his window and saw Shaw's new automobile. (R. 95, 96).

When Shaw visited him, Mr. Forgy testified, only Jimmy Patterson, Shaw, Brown, and he (Mr. Forgy) were present. (R. 96). He also said that while Shaw was there no one went

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When Shaw visited him, Mr. Forgy testified, only Jimmy Patterson, Shaw, Brown, and he (Mr. Forgy) were present. (R. 96). He also said that while Shaw was there no one went

to the rear of the trailer; that he did not sell Shaw any substance, nor take Shaw's watch; that Mr. Forgy had sold Shaw nothing; and that he had nothing like heroin at his trailer. (R. 97, 98).

Mr. Forgy said that when Shaw and Brown arrived, Mr. Forgy and Jimmy Patterson were drinking beer and watching television. (R. 98). He said Shaw only stayed about forty-five minutes and that, while he was there, Shaw smoked marijuana, which Shaw had brought to the trailer, with Brown and Patterson, while he (Mr. Forgy) continued only to drink beer. (R. 98).

Mr. Forgy testified that he never met Shaw at H. O. Forgy & Son and never exchanged a $20.00 bill for a watch. (R. 98). He also testified that he did not know anything about, had never touched nor had anything to do with, any substance turned over to the Jackson Police Department by Shaw. (R. 99).

Jimmy Patterson's testimony corroborated the testimony of Mr. Forgy concerning Shaw's visit. (R. 115-144). He stated that he was in the presence of Mr. Forgy, Shaw and Brown the whole forty-five minutes to one hour Shaw and Brown were at the trailer, and that no substance was sold or exchanged between Mr. Forgy and Shaw. (R. 119-120).

H. O. Forgy, Jr. (R. 144-148), Miss Lee Ann Bynum (R. 148-151), and Mrs. Florence Bynum (R. 151-153) testified on behalf of Petitioner after which the defense rested and renewed its motion for a directed verdict, which the Trial Court overruled. (R. 153).

In Petitioner's appeal to the Court of Criminal Appeals of Tennessee, his assignments of error included the following (edited):

(a) The Trial Court permitted the verdict of the jury to stand based on insufficient evidence to sustain such a verdict, *id est.*, the uncorroborated testimony of an accomplice;

(b) The Trial Court permitted the verdict of the jury to stand when the evidence in the case preponderated in favor of the innocence of the defendant and against his guilt;

(c) The Trial Court permitted the *corpus delicti* (sale of heroin) to be established by the uncorroborated testimony of an accomplice;

(d) The Trial Court permitted the verdict of the jury to stand based on the connection of the defendant with the *corpus delicti* solely by the uncorroborated testimony of an accomplice;

(e) The Trial Court permitted irrelevant, immaterial, highly inflammatory, and prejudicial testimony concerning defendant's appearance and defendant's association with black persons to be introduced by the Attorney General when said testimony was calculated to arouse the ill will of the jury.

All of the abovementioned assignments of error were overruled by the Court of Criminal Appeals of Tennessee on February 13, 1974.

Petitioner assigned as error in his Petition to the Tennessee Supreme Court for Writ of Certiorari to the Court of Criminal Appeals of Tennessee each of the above-assigned errors. Petitioner's Request for Writ of Certiorari to the Court of Criminal Appeals of Tennessee was denied, without opinion, by the Supreme Court of Tennessee on July 15, 1974. Petitioner's Motion to Reconsider Petition for Certiorari was denied August 12, 1974.

REASONS FOR ALLOWANCE OF WRIT

This Honorable Court should review this cause and grant the Petition for Writ of Certiorari to the Supreme Court of Tennessee, because each and both of the issues raised in this petition present important constitutional issues decided by the Supreme Court of Tennessee in a way not in accord with applicable decisions of this Honorable Court upholding the constitutional rights to due process of law and equal protection under the law.

First Issue

Were Petitioner's constitutional rights to due process and/or equal protection of the law violated by the Trial Court's allowing the State's attorney to inject racial and social prejudice into the trial through questioning of Petitioner and other witnesses?

In *Berger v. United States* (1935), 295 U.S. 78, 55 S.Ct. 629, this Court said:

> "The U.S. Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." 295 U.S. at 88, 55 S.Ct at 633.

The record in the case at bar reflects questions and assertions concerning Petitioner's hair length, beard, mustache, and his relationships with several black persons. Even Patterson, a witness for Petitioner, was questioned as to his contact with blacks as well as questions concerning his extracurricular activities surely calculated to bias the jury against the Petitioner and his cause. (R. 48-49, 101, 102, 113-115, 136-137). The identity of Petitioner was never in doubt and, hence, there was no necessity for the prosecution to introduce testimony concerning the before and after appearance of Forgy. On the same note, Petitioner's social activities were certainly not relevant to whether or not he, indeed, sold a controlled substance to an undercover agent, and the fact that these activities did include black persons is equally irrelevant. Surely the prosecution was determined to bias the jury by nurturing racial and social prejudices.

Statements, remarks, and innuendos of this sort by the prosecutor, which are reasonably calculated to appeal to or evoke racial prejudice, are universally condemned as being violative of the right of an accused to a fair and impartial trial. Recently a Fifth Circuit Court, consistent with prior decisions of this Honorable Court, has seen fit to hold that the admission of irrelevant facts that have a prejudicial tendency is fatal to a conviction. *United States v. Allison* (5th Cir. 1973), 474 F2d 286; *Williams v. United States* (1897), 168 U.S. 382, 18 S.Ct. 92; *Hall v. United States* (1893), 150 U.S. 76, 14 S.Ct. 22.

Improper remarks calculated to create, arouse, or inflame the sympathy, prejudice, or passion to the jury to the detriment of the accused have been condemned by numerous other cases. *AZ Din v. United States* (9th Cir. 1956), 232 F2d 283, cert. denied 77 S.Ct. 39, 352 U.S. 827; *Pietch v. United States* (10th Cir. 1940), 110 F2d 817, cert. denied 60 S.Ct. 1100, 310 U.S. 648; *Remus v. United States* (6th Cir. 1924), 291 F. 501, cert. denied 44 S.Ct. 180, 263 U.S. 717.

The Court in *United States v. Grey* (6th Cir. 1970), 422 F2d 1043 reversed a conviction founded on "the deliberate injection of racial prejudice in the U. S. Attorney's cross-examination of one of defendant's character witnesses." The Opinion at page 1046 stated:

> "Appeals to racial prejudice are foul blows and the courts of this country reject them. Where, as here, the facts are such as to indicate that such prejudicial tactics may have had a substantial influence upon the results of a trial, reversal for a new trial is ordered."

Also in *United States ex rel. Haynes v. McKendrick* (2nd Cir. 1973), 481 F2d 152 that Court at page 152 stated:

> "We agree with the District Court that the prosecutor's remarks introduced racial prejudice into the trial and thereby denied petitioner his constitutional rights under the due process clause to a fair and impartial trial. There can be no doubt that the prosecutor's remarks would have required reversal in a federal court appeal under the decisions of this and other federal courts."

The purpose and spirit of the Fourteenth Amendment requires prosecutors in state courts to refrain from racially prejudicial slurs. *Norman Williams v. United States* (6th Cir. 1970), 422 F.2d 1043, cert. denied 91 S.Ct. 380, 400 U.S. 967; *United States v. Lamerson* (5th Cir. 1972), 457 F2d 371; *United States v. Grunberger* (2nd Cir. 1970), 431 F2d 1062; *Skuy v. United States* (8th Cir. 1919), 261 F. 316.

Tennessee cases also uphold the concept that it is an improper tactic to make remarks which appeal to or tend to excite racial prejudices. *Bolin v. State* (1971), — Tenn.Cr.App. —, 472 S.W.2d 232; *Burlison v. State* (1973), — Tenn. —, 501 S.W.2d 801; *Manning v. State* (1953), 195 Tenn. 94, 257 S.W.2d 6; *Vines v. State* (1950), 190 Tenn. 644, 231 S.W.2d

332; *Hiller v. State* (1932), 164 Tenn. 388, 50 S.W.2d 225. The Tennessee Supreme Court stated in *Roland v. State* (1917), 137 Tenn. 663, 194 S.W. 1097:

> "An appeal to race prejudice on the part of a sworn officer of the state is inexcusable . . . all races are equal before the law and have the same rights in our courts. No officer of the state can be allowed to forget this, and no language by such officer that tends to arouse race feelings, even though used in heat of argument, can be passed without rebuke."

Petitioner advances the rule of law that the admission of irrelevant and prejudicial testimony goes against state and federal constitutions guaranteeing a defendant the right to "be informed of the nature and cause of the accusation." Defendant has the right to know the area to be covered, and facts not relevant to that area cause him to be taken by surprise and denies him the opportunity to prepare himself for such improper tactics. This rule also prohibits asking questions which, by innuendo, place irrelevant and prejudicial evidence before the jury. *Wharton's Criminal Evidence*, 13th Ed., Vol. 2, § 164 pp. 302-303; *Roland v. State*, supra; *Hall v. United States*, supra; *United States v. Grey*, supra.

It is readily apparent from the excerpts contained in the Statement of the Case, *supra*, that Petitioner sustained numerous foul blows to his constitutional rights by the totally irrelevant and highly prejudicial questions and innuendos injected into the trial of this case by the prosecuting attorney. Petitioner's conviction, therefore, did not result from a fair and impartial trial, free of racial and social prejudices, and he is, therefore, entitled to a new trial untainted by flagrant violations of his rights to due process and equal protection under the law. It is, therefore, respectfully submitted this Honorable Court should grant this Petition for Writ of Certiorari.

Second Issue

Were Petitioner's constitutional rights to due process and/or equal protection of the law violated by allowing the conviction to be sustained on the uncorroborated testimony of an accomplice when Tennessee law clearly states that the uncorroborated testimony of an accomplice is not sufficient to sustain a conviction?

In Tennessee, the rule of law is clearly established that a conviction in a criminal proceeding based on the uncorroborated testimony of an accomplice is prejudicial error. *Kinchelow v. State* (1844), 24 Tenn. 9, 5 Hump. 1; *Robinson & Jones v. State* (1855), 84 Tenn. 146, 16 Lea 123; *Clapp v. State* (1895), 94 Tenn. 186, 30 S.W. 214; *Smartt et al. v. State* (1904), 112 Tenn. 539, 80 S.W. 586; *Hicks v. State* (1912), 126 Tenn. 359, 149 S.W. 1055; *Collins v. State* (1935), 169 Tenn. 393, 88 S.W.2d 452; *Ripley v. State* (1950), 189 Tenn. 681, 227 S.W. 2d 26; *Moore v. State* (1968), 1 Tenn. Cr. App. 190, 432 S.W.2d 684.

In *Sherril v. State* (1959), 204 Tenn. 437, 321 S.W.2d 811, a leading Tennessee case on this subject, the Tennessee Supreme Court stated at 321 S.W.2d 814:

> ". . . Under the common law the testimony of an accomplice, if it satisfies the jury beyond a reasonable doubt of the guilt of the defendant, may be sufficient to warrant a conviction although not corroborated. The obvious dangers of this common-law rule with respect to accomplice testimony had led to the adoption in many states of statutes expressly providing that a person cannot be convicted of a crime on the uncorroborated testimony of an accomplice. In Tennessee, in absence of any general statute on this question—there being no general statute as far as we have found or been pointed out—the courts at the very beginning

> of the judicial history of this state seeing the weakness in the accomplice's testimony required corroboration in all felony cases."

Petitioner contends that Shaw, the undercover agent whose testimony incriminated Petitioner, was an accomplice in the alleged sale of a controlled substance. The definition of an accomplice as proposed in *Clapp v. State, supra,* justifies this contention. An accomplice is defined to be a person who knowingly, voluntarily, and with common intent with a principal offender, unites in the commission of a crime. This concept is reiterated in *Moore v. State, supra.* Several cases determine whether a co-actor was an accomplice by applying the test—could he himself have been indicted for the offense either as principal or accessory? *State v. Lawlor* (1881), 28 Minn. 216, 9 N.W. 698; *Casone v. State* (1952), 193 Tenn. 303, 246 S.W.2d 22.

In this particular case, the "purchasers" allegedly participated in an act *malum in se* (the sale of heroin). *Grindstaff v. State* (1964), 214 Tenn. 58, 377 S.W.2d 921. The act *malum in se* requires no specific intent. *Hurt v. State* (1947), 184 Tenn. 608, 201 S.W.2d 988. The fact the officer did not have specific intent to commit a crime does not prevent him from being an accomplice to the act as the specific intent requirement is eliminated by the offensiveness of the act to the public welfare. *Shelly v. State* (1895), 95 Tenn. 152, 31 S.W. 492; *Sherril v. State,* supra; *Scott v. State* (1960), 207 Tenn. 151, 338 S.W.2d 581; *Underwood v. State* (1971), — Tenn. Cr. App. —, 465 S.W.2d 884. These Tennessee cases have consistently held that there need be no specific intent to establish the *mens rea* to make a participant in the commission of a crime an accomplice under Tennessee law.

The State's contention that Shaw was not an accomplice, because he was a police officer, is foreclosed, we submit, by the

undeniable fact that he was operating five or six miles outside the jurisdictional limits of his authority and was not in "hot pursuit." This fact is admitted by Shaw as well as his superior. A police officer has been held to be an accomplice when he acted outside of his jurisdiction. *Elliott v. State* (1922), 92 Tex. Crim. 571, 244 S.W.2d 1007. By statute, Tennessee municipal police officers' authority extends only one mile from the corporate limits. *Tennessee Code Annotated*, § 6-609 states:

> "6-609. *Extension of police authority beyond limits.*— The authority of all incorporated towns and cities shall extend to a distance of one (1) mile from the lawful corporate limits thereof, for the suppression of all disorderly acts and practices forbidden by the general laws of the state; provided that such jurisdiction of an incorporated town or city shall not be hereby extended beyond the limits of the county in which any part of such town is situated, or so as to come within one (1) mile of any other incorporated town or city."

The important factor of Shaw acting outside his jurisdictional limits and not in "hot pursuit" while allegedly transacting the sale clearly distinguishes Petitioner's case from the majority of cases holding that an undercover agent is not considered an accomplice, most notably, *Halquist v. State* (1972), — Tenn. Cr. App.—, 489 S.W.2d 88. In the present case, Shaw knowingly acted outside his jurisdiction in participating in the commission of an act *Malum in se*. It follows that the intent of his act is supplied and, as an officer outside his jurisdiction or as a private citizen, he could be, and in fact was, an accomplice to the alleged crime.

Having set out the appropriate Tennessee law requiring the testimony of an accomplice to be corroborated in order to sustain the conviction, Petitioner asserts he was placed in an arbitrary class due to the fact he was convicted on the uncorroborated testimony of an accomplice and, thus, denied equal protec-

tion of Tennessee law. The fact that Petitioner's accomplice was a police officer acting outside his jurisdiction caused him to be placed in a class wherein he was denied due process of law and equal protection of the law, because his conviction was upheld based on the uncorroborated testimony of an accomplice. Shaw, without police authority, was a "private citizen" at the time and place of the alleged transaction and was, therefore, an accomplice.

This Honorable Court has defined the equal protection clause of the constitution to mean that the rights of all persons must rest upon the same rule under similar circumstances. *Louisville Gas & Electric Company v. Coleman* (1928), 277 U.S. 32, 48 S.Ct. 423; *Frost v. Corporation Commission of State of Oklahoma* (1929), 278 U.S. 515, 49 S.Ct. 235; *South Carolina ex rel. Phoenix Mutual Life Insurance Co. v. McMaster* (1915), 237 U.S. 63, 35 S.Ct. 504. The individual states cannot escape their duty to conform their court procedures to this definition and protect all citizens in the enjoyment of equality of rights. *United States v. Cruikshank* (1875), 92 U.S. 542; *Hill v. Texas* (1942), 316 U.S. 400, 62 S.Ct. 1159. The State of Tennessee cannot shirk its duty to apply its law equally to all persons within the class designated to be protected by the law. Petitioner contends he is within the class protected by Tennessee's unique rule of law requiring the testimony of an accomplice to be corroborated for a resulting conviction to stand. Petitioner contends he was denied equal protection of the law, because he was placed in an arbitrary class, said not to be within the scope of Tennessee's accomplice law, due to the fact his accomplice was an undercover agent in the employment of the Jackson, Tennessee Police Department. The fact remains that the undercover agent acted outside his jurisdiction allowing himself to be classified as an accomplice.

Petitioner offers to this Honorable Court an analogy to his present situation for its learned consideration. This Court has

decreed the principle that a state may not, under the equal protection clause of the Fourteenth Amendment, draw a line which constitutes an invidious discrimination against a particular class. *Levy v. Louisiana* (1968), 391 U.S. 68, 88 S.Ct. 1509; *Gomez v. Perez* (1973), 409 U.S. 535, 93 S.Ct. 872; *San Antonio Independent School District v. Rodriguez* (1973), 411 U.S. 1, 93 S.Ct. 1278. In each of these cases, this Court upheld the claim by illegitimate children that they had been denied equal protection of the law by exclusion from various statutes concerning the rights of children. Under the equal protection clause of the Fourteenth Amendment, a state was not allowed to discriminate against illegitimate children by denying them substantial benefits accorded to children generally. The Court in *Gomez v. Perez, supra,* stated at page 872:

> "We, therefore, hold that once a state posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother; for a state to do so is illogical and unjust; and lurking problems with respect to proof of paternity cannot be made into an impenetrable barrier which works to shield otherwise invidious discrimination."

Analogous to this fact situation is Petitioner's fact situation. The State of Tennessee expounds a rule of law requiring the testimony of an accomplice to be corroborated, thereby giving Petitioner the benefit of the law, hence there should be no constitutionally sufficient justification for denying Petitioner such an essential right, because his accomplice happens to be a police officer outside his jurisdiction. Furthermore, the problems with respect to establishing the police officer as an accomplice should not be made into an impenetrable barrier which works to shield otherwise invidious discrimination. The analogy is clear. Petitioner was denied equal protection of the law, because he was

excluded from a class granted protection under Tennessee law and, instead, forced into an arbitrary class denied equal protection of Tennessee law.

Petitioner prays that this Honorable Court enforce his rights under due process of law and equal protection of the law and not allow him to be arbitrarily separated from a class normally protected under Tennessee law.

CONCLUSION

In deference to justice, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted

HENRY V. SUTTON
Attorney at Law
Suite 2904
100 North Main Building
Memphis, Tennessee 38103

and

KEMPER B. DURAND
Attorney at Law
Suite 1105
Union Planters Bank Building
Memphis, Tennessee 38103

Attorneys for Petitioner

Certificate of Service

I, Henry V. Sutton, one of Petitioner's attorneys, hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served via U.S. mail, postage prepaid, on the Attorney General of the State of Tennessee at his offices located in the Supreme Court Building, Suite 414, Nashville, Tennessee 37219, on this the ..... day of October, 1974.

HENRY V. SUTTON